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Supreme Court, U.S.
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No. 00-1330

In The

Supreme Court of the United States

BRUCE A. FRIEDEMANN,

Petitioner,

v.

TERRI MCCORMICK, GUADALUPE GUTIERREZ, JOAN GILBERT, LUCY BRAJEVICH, KATHLEEN ASSAR, MICHAEL ENGS, JOE TORRO, MARGARET SPRAGUE, J. GRAHAM SMART, PIMA COMMUNITY COLLEGE DISTRICT BOARD OF GOVERNORS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Was Pima's[1] decision to academically fail Petitioner for his submission of a substandard nursing process recording[2] (hereinafter PR) arbitrary, capricious and without a rational basis.

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[1] All Respondents hereinafter referred to as "Pima."

[2] The purpose of the process recording is to assist the student to effectively communicate and interact with patients. Doc. 99 at 3, B-11. (Doc. refers to Ninth Circuit Docket Number.)

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STATEMENT OF THE CASE

A. Nature of the Case

Petitioner enrolled in Nursing 101 at Pima Community College in 1996. His first semester clinical instructor, Lupe Gutierrez, recommended he be failed because she had serious concerns about his performance regarding several required learning objectives, including an assigned PR. Petitioner, Ms. Gutierrez and Joan Gilbert, the Nursing Director, met to discuss the failure. Although Ms. Gilbert agreed the PR was substandard, she recommended that Ms. Gutierrez not fail Petitioner and that she allow him to improve during the second clinical rotation. Her recommendation was followed.

During the second semester, Petitioner's clinical instructor was Terri McCormick. She failed him for submitting a second substandard PR after allowing it to be rewritten and spending extra time with him.

B. Course of Proceedings

On April 30, 1997, Petitioner filed a Complaint against various Defendants, including Pima Community College, his instructors and other individuals involved in Pima's internal appeal and review process.[3] He claimed he was failed because of his religious and political views and Pima's bias and prejudice. Petitioner's Third Amended Complaint was filed February 17, 1998, by order granting motion to amend dated February 12, 1998.

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[3] Petitioner's grade was changed to an "I" (incomplete) by Graham Smart, Pima's West Campus President.

Pima answered on May 28, 1998. Petitioner alleged violations under 42 U.S.C. §§ 1983 (civil rights violation), 1985 (conspiracy), 1986 (failure to prevent conspiracy), 12132 (Americans With Disability Act), and the First and Fourteenth Amendments to the U.S. Constitution.

On June 14, 1999, Pima filed a Motion for Summary Judgment. In his response to Pima's Motion for Summary Judgment, Petitioner conceded that his Sections 1985 and 1986 claims are properly dismissed.

On September 7, 1999, District Court Judge John Roll ordered Pima's Motion for Summary Judgment be granted and dismissed the action with prejudice. Judgment was entered September 7, 1999. On September 21, 1999, Petitioner filed a Motion for Reconsideration, which was denied by order of the court dated September 27, 1999. Notice of Appeal was filed on October 21, 1999.

By Memorandum Decision filed July 13, 2000, the Ninth Circuit affirmed, after *de novo* review, the District Court's grant of summary judgment. **Appendix to Petitioner's Writ**. The Court found the record did not compel the conclusion that the Defendants acted arbitrarily in their academic decision. ***Id***. Petitioner's request for full panel rehearing was denied on November 17, 2000. ***Id***.

Petitioner timely filed his Writ of Certiorari with this Court.

C. Facts – Discrimination/Bias

1. Petitioner's Testimony

Pima Defendants are evil, rotten, sick people, all of them. **Doc. 83 at 2, Exh. A-19**. They are goddamn ignorant and that is why I bring them before the bar. ***Id.*** My first clinical rotation was with Ms. Gutierrez. ***Id.*** **at 4**, A-24. Her behavior was pathetic. ***Id.*** I am pro-euthanasia. That is a "possibility" that had to do with the reason I was flunked. ***Id.***, A-25. McCormick's bias "could be" a lot of things, including her bias against men, someone who believes in euthanasia or she could be prejudiced because she has asthma or "maybe" her son does. ***Id.*** **at 5**, A-26. McCormick is divorced, "maybe" that means she doesn't like men or men don't like her or something. The basis of her euthanasia bias "may be" based on my published letter to the editor or "it could have been" because of something I said. ***Id.*** **at 6**, A-27. The main reason she was prejudiced is because she seems like the kind of person who has "asthmatic personality." ***Id.*** The reason I was flunked could have been a hundred things. ***Id.***, A-28. She could have had some malice for some reason I'm not fully aware of at the moment. ***Id.*** **at 7**, A-29.

McCormick could have heard conversations or had other knowledge from reading newspapers where my letters were published or something, though I don't know in fact whether she ever read a letter to the editor. ***Id.***

As to the allegations of religious bias or prejudice I might have discussed Jesus Christ during a lunch session. ***Id.*** **at 8**, A-29. I did not discuss religious beliefs with McCormick. ***Id.*** She "could have" seen me on cable TV. I

talk about St. Paul as the Antichrist and Jesus is the logos or the logic of God. I discuss a lot of things about money and how the Jews lied about the Holocaust. *Id.* I believe McCormick was aware of my religious beliefs but I don't know "as a matter of fact." *Id.*, A-30. There has to have been some psychological or other reason for her to flunk me. *Id.* She is not competent or she has no business flunking me so she must have been prejudiced. *Id.* She cannot flunk somebody for turning in a genius level superb PR unless there is malice, prejudice, bigotry, bias or some other reason for doing it. *Id.* I am "assuming" she had one of those reasons. *Id.*

The basis of the allegation against McCormick of age discrimination is because I am not young and fresh like some of the girls. *Id.* **at 9**, A-31. I have a jaded attitude. I am cynical and mean, ornery. Maybe she just thought I was too old. *Id.* There are no facts to support that speculation, "It is just something I'm speculating about." *Id.*

It is exactly true that I am "speculating" about the allegations of scientific, religious, political beliefs and gender and age as well as personality. *Id.* There is some reason she flunked me. "I can't put my finger on it, but it could be any one of those things." *Id.* She may not like my personality because I'm mean and ornery. I don't smile. I look bad. I have long hair. "It could be any of those things." "I'm certain it's something, but I don't know which one." *Id.*

As to Gilbert, Gutierrez and Brajevich, my testimony would be the same with respect to their dislike of my personality and beliefs as it was with McCormick. *Id.* **at 9-10**, A-31. There was ulterior motive. *Id.* **at 10**, A-31.

There is no specific fact or specific facts but there must have been something. *Id.*

As to McCormick, Gutierrez and Gilbert, it is exactly true that I can't put my finger on it but I know there was something. *Id.* **at 12,** A-36.

The other allegations against Brajevich is like all the rest of the Defendants. There has to be something hidden for some reason. I can't put my finger on it but it is there. *Id.*, A-37. It is "supposition" that the incident with Brajevich may have affected her input. *Id.*

As to Kathleen Assar, she went along with it. *Id.*, A-37. She did not want to offend the teachers or the Teachers' Union. It's obvious something is wrong. *Id.*, A-38. It is speculation that Kathleen Assar went along because she was one of the crew. *Id.*

Allegations of inappropriate administrative discrimination [separate from grade appeal] against Engs, Torro, Sprague and Smart. They all went along with the discrimination. They refused to reverse it. *Id.* **at 13,** A-30. I was being discriminated against for some reason not in the academic performance but for some ulterior motive and most likely it was because they thought I was mentally ill and incompetent. *Id.* There are no specific facts against Torro, Engs and Smart. Their motives were different. They did not want to rock the boat. *Id.* They "had to have" another reason. They should have ruled in my favor because it was obvious I was discriminated against. I am speculating with respect to Engs, Torro, Sprague and Smart that they didn't want to rock the boat. *Id.* Engs was not out to get me. He had no malice. *Id.*, A-39. He just

wanted to get on with his life and promotions. He is a good guy. *Id.*

The ADA claim is because I did not like chatting. *Id.* **at 14.** I did not request an accommodation for dislike of chatting. *Id.*, A-42. I am not mentally ill. I did not request an accommodation as a result of mental illness. Even if I was not mentally ill, they thought I was and should have accommodated me by being more tolerant and patient. *Id.*

As to McCormick, Gutierrez, Gilbert, Brajevich, Assar, Engs, Sprague, and Smart they all discriminated not because I can put a finger on a specific item or fact but because I know my PR was, if not genius level, certainly appropriate and above standard. *Id.* **at 14-15,** A-42. That being the case, there must have been some other reason for them to act and uphold the failing grade and declining the two appeals. *Id.* **at 15,** A-42.

Smart changed the failing grade to incomplete. *Id.*, A-43.

2. Pima's Testimony

Joan Gilbert has been a registered nurse since 1962. **Doc. 99, 2, Exh. B-9.** She has been in nursing education since 1996. *Id.* Throughout her nursing she participated in a clinical practice and performed a broad spectrum of nursing activities. *Id.* She has a Bachelor of Science degree, Master's of Arts degree in education and psychiatric mental health and is currently a Ph.D. candidate in higher education. *Id.* She has taught all areas of nursing, including medical, surgical, maternity, pediatrics, psychiatric, trends and issues, math and nutrition. *Id.* She was

Director of Nursing at Pima Community College from 1989 through 1997, thereafter being on faculty. *Id.* Her duties as Director were supervising and working with faculty, including Terri McCormick and delivery of the entire nursing program at Pima. *Id.*

Ms. Gilbert first met Bruce Friedemann in the Spring semester of 1996 with Lupe Gutierrez. *Id.*, B-10. Ms. Gutierrez had serious concerns regarding Mr. Friedemann's performance in his first clinical rotation of the semester regarding several required learning objectives, including an assigned PR. *Id.* Ms. Gutierrez was prepared to fail Mr. Friedemann because of the substandard performance, including the PR. Ms. Gilbert reviewed the recording and agreed it was substandard. *Id.* Ms. Gilbert recommended Ms. Gutierrez not fail Mr. Friedemann and allow him to improve during the second clinical rotation. *Id.* at 2-3, B-10. During her meeting with Mr. Friedemann, she observed he did not agree with any constructive suggestions. *Id.* at 3, B-10. He indicated the instructor was picking on him and was biased. *Id.*, B-10.

D. Facts – Process Recordings

1. Petitioner's Testimony

The PR related to the failure was in the clinical rotation with Ms. McCormick. **Doc. 83, 3, A-22.** There were two PRs. The superb PR was probably the second, which was better than the first. *Id.* A PR is a conversation with somebody you work with in the hospital or clinic, a patient. *Id.*, A-23. I really don't know the purpose. *Id.* I believe they used it to psychologically evaluate people and flunk people they did not like. *Id.* I think that's the

only purpose of it. The PR in the text was the silliest most stupid thing. *Id.* **at 4**, A-23. It was disgusting. Like a fifth grade girl talking to a baby. *Id.* Anybody could do better. I could do better with my eyes closed. It was ridiculous. *Id.* The reason McCormick flunked me was because of the PR content. *Id.* **at 6**, A-27. Someone in her family may have asthma and she was offended by the content of the PR. *Id.* My PR is superb. "It's genius level." *Id.* The people at Pima are nuts, ignorant, irrational, obstinate, ignorant. *Id.* You name the reason I was flunked. There could have been a hundred things. *Id.*, A-28. McCormick "must have" been prejudiced. *Id.* **at 8**, A-30. She can't flunk somebody for turning in a genius level superb PR unless there is malice, prejudice, bigotry, bias or some other reason for doing it. *Id.* I am assuming she had one of those reasons. *Id.*

No one reviewed the PRs to determine whether they are genius level or even above standard. *Id.* It is self-evident and obvious. *Id.* I did not have any other person in the health care profession, nurse or doctor, review the PRs for an opinion. *Id.* It is accurate that I have not had any medically trained person review the PRs. *Id.*

My first clinical rotation was with Guadalupe Gutierrez. *Id.* **at 11**, A-34. I had a problem with her regarding the PR. *Id.* She was not satisfied with the PR. It barely squeaked by. *Id.*, A-35. She recommended I fail. The two of us went to Joan Gilbert, who suggested I be given another chance to continue the program. *Id.*

I had my own ideas about what a PR should be. *Id.* **at 13-14**, A-40. My ideas were better than those in the book. *Id.*

2. Pima's Testimony

I (**Joan Gilbert**), Nursing Director, had a second meeting with Mr. Friedemann and Terri McCormick on May 16, 1996, to discuss his failing grade. **Doc. 99, 3, B-11.** I reviewed Mr. Friedemann's rewritten PR, which did not meet criteria and was unsatisfactory. ***Id.*** There was no accountability or responsibility on Mr. Friedemann's part regarding his performance. ***Id.*** His position was, "We did this to him." He was unwilling to hear what we had to say. He yanked pages out of Ms. McCormick's hand, cursed and said, "I'll see you in court." ***Id.***

In over 30 years of nursing practice and teaching I have evaluated over 1,000 PRs. ***Id.*** The purpose of the PR is to assist the student to effectively communicate and interact with patients. ***Id.*** The student is not to use the PR to diagnose a patient's problems. ***Id.*** The PR is to learn effective communication skills. ***Id.***

Mr. Friedemann's rewritten PR for Terri McCormick was equal to the worst PR I have been called upon to review. ***Id.*** Mr. Friedemann was unable to critique his nurse/patient interaction. ***Id.*** He could not or would not analyze his communication process. ***Id.*** Part of the PR requires the student to complete an analysis and evaluation to determine what techniques were helpful and what techniques were not and what he should do differently. Mr. Friedemann had difficulty with this assignment. ***Id.*** Terri McCormick and I evaluated the PR based upon our education, experience, skill, and training as nurses and nursing instructors. ***Id.*** **at 4**, B-12. My opinion and Ms.

McCormick's opinion that the PR was substandard was based upon our professional judgment and did not arise from any prejudice or animosity toward Mr. Friedemann. *Id.*

Mr. Friedemann complains the PR should have been reviewed by a psychiatrist. *Id.* I am not a psychiatrist but I have a background in psychiatric nursing as well as a Master's degree in nursing with a specialty in the area of psychiatric/mental health. *Id.* I have been with a teaching faculty in the psychiatric nursing area at Pima College for the last two years. *Id.* I have personally graded PRs for students in my assigned clinical lab. *Id.*

The PR is graded on a satisfactory or unsatisfactory basis. *Id.* If a student receives an unsatisfactory, he or she fails the clinical rotation and the course. *Id.* Students are informed of this during the initial class orientation. *Id.* It is my observation that students are well aware of this policy. *Id.* A nursing student may receive "A"s in all other aspects of the nursing course, receive an unsatisfactory on the PR, fail the clinical rotation and the entire course. *Id.* That was the grading policy at Pima during my tenure as Director of Nursing and was applicable to Mr. Friedemann. *Id.*

It is unusual for a student to fail the nursing course because of a substandard PR. *Id.* **at 5,** B-13. I can recall other students, not first year, who failed the course because of either a substandard PR or a substandard care plan. *Id.* The failure of Mr. Friedemann was justified by the inadequate and substandard PR. *Id.*

Mr. Friedemann was aware that a second satisfactory PR was required during the second clinical rotation. *Id.* **at**

6, B-16. A third meeting with Mr. Friedemann occurred with Terri McCormick to discuss the unsatisfactory clinical evaluation he received. *Id.* A primary basis for the unsatisfactory evaluation was an unacceptable PR which the student submitted at the last possible moment. *Id.* The instructor and I presented many areas of concerns including giving information, giving opinions, making broad generalizations, intellectualizing and an inability to self-evaluate the therapeutic evaluation. *Id.* After a lengthy discussion Mr. Friedemann stated, "This is all silly, stupid, and irrational. I'm just getting the ___ out of here . . . I'll see you in court." *Id.*

Terri McCormick has been a registered nurse since 1987. **Doc. 99 at 6, C-18**. Bruce Friedemann, a student in Nursing 101 at Pima College, entered my second clinical rotation at Northwest Hospital in March or April 1996. During the rotation, I observed Mr. Friedemann needed to improve his communication skills with patients. *Id.* I began to spend more time with Mr. Friedemann than the other students because I felt he needed more instructional supervision and guidance. *Id.* **at 7**, C-18. The students were required to write a second PR in my rotation. *Id.* I graded Mr. Friedemann's second PR and found it to be unsatisfactory. *Id.*, C-19. I spent approximately one hour after class with Mr. Friedemann discussing his unsatisfactory PR. *Id.* I explained the objectives of the PR and why his was unsatisfactory. I told him I would give him the opportunity to rewrite the PR. *Id.* He stated he understood what to do. I gave him my home telephone number so he could call me if he had further questions. *Id.* He never called me. *Id.*

Mr. Friedemann handed me his rewritten PR at the restaurant where the class was having lunch on the last day of school. *Id.* I graded the PR as soon as I got home. I found the rewritten PR to be unsatisfactory. *Id.* I spoke with my co-instructors, Kay Baker and Lupe Gutierrez, to discuss my decision for an unsatisfactory grade. I called Mr. Friedemann to let him know the rewritten PR was unsatisfactory and he would receive a failing grade. *Id.*

I evaluated and graded Mr. Friedemann's two PRs based upon my education, training, professional judgment, experience and skill as a nurse and nursing instructor. *Id.* I told the students if they did not pass any portion of the clinical rotation they would fail the entire course. *Id.* High emphasis is placed on these assignments. *Id.* at 20, C-19.

REASONS FOR DENYING THE WRIT

A. Judicial Review of an Academic Student Dismissal Is Limited to Whether the Decision Was Motivated by Ill-Will, Was Arbitrary and Capricious and Completely Unrelated to Academic Performance So as to Have No Rational Basis.

The principles for determination and review of academic decisions have been established by the United States Supreme Court in ***Regents of the Univ. of Michigan v. Ewing***, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) and ***Board of Curators of Univ. of Missouri v. Horowitz***, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). The principles set forth in these cases are dispositive of Petitioner's claim.

Clements v. County of Nassau, 835 F.2d 1000 (2nd Cir. 1987), is factually similar and dispositive. A grant of summary judgment for the college was upheld on appeal. Plaintiff, a nursing student, failed the clinical component of the course and automatically earned an F for the entire course. She alleged defendants were motivated by personal animus and ill-will rather than a legitimate assessment of her academic performance and that defendants acted in concert to force her out of the nursing program. The Court first noted the propriety of summary judgment in cases of judicial review of grading procedures:

> Allegations of improper conduct levelled against teachers in our university systems call into play fundamental questions of fairness. At times, however, they threaten to strike at the heart of institutions of higher learning. As Robert Maynard Hutchins once cautioned, "Freedom of inquiry, freedom of discussion, and freedom of teaching – without these a university cannot exist." This is particularly true where the charges are aimed at the core of a teacher's authority, the student's grade. In such cases of academic dismissals, summary judgment, when properly employed, can serve the laudable function of protecting our crucibles of knowledge from the vagaries of the judicial system. 835 F.2d at 1001.

As does Petitioner, *Clements* complained under 42 U.S.C. § 1983. The Court noted where the record could not lead a rational trier of facts to find for the non-moving party there is no "genuine issue for trial." *Id.* at 1004. Specifically:

> In cases involving academic dismissal, educational **institutions have the right to receive**

> **summary judgment unless there is evidence from which a jury could conclude that there was no rational basis for the decision or that it was motivated by bad faith or ill-will unrelated to academic performance.** *Ikpeazu v. University of Nebraska*, 775 F.2d 250, 253 (8th Cir. 1985) (per curiam). The legal standard in challenging an academic expulsion is necessarily a higher one than for disciplinary dismissals because, as the Court explained in refusing to require colleges to provide hearings, the determination is more subjective and evaluative than the factual questions present in most disciplinary decisions. *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 90, 98 S.Ct. 948, 955, 55 L.Ed.2d 124 (1978). Recently, in *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985), the Court expanded upon this stance of judicial deference. When courts review the substance of academic decisions, it stated, they should show great respect for the teacher's professional judgment. Specifically, the **Court held that courts may not overturn such decisions "unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."** *Ewing*, 474 U.S. at 225, 106 S.Ct. at 513. *Id.* at 1004-05 (emphasis added).

The Court noted plaintiff's version was based upon her "conclusory statements." *Id.* at 1005. The Court rejected plaintiff's claim of personal animosity of the teachers as creating a factual issue. "The state of mind exception, however, is appropriate only where solid, circumstantial evidence exists to prove plaintiffs' case." *Id.* Petitioner

admits his allegations are based on his personal speculation. Clements asserted that the faculty "must have resented" her appeals. That is similar to Petitioner's argument that there "must have been" bias, prejudice and discrimination. The ***Clements*** Court noted, just as here, "There is no indication of any such hostility in the record." 835 F.2d at 1005. Acknowledging there was some "slight circumstantial evidence" the Court found:

> It does not reveal any material fact in dispute from which a reasonable jury could conclude that her failing grade was such a substantial departure from accepted academic norms as to demonstrate that the teacher did not exercise professional judgment. **Where, as here, the circumstantial evidence is so minimal and the legal standard of proof so daunting, summary judgment is appropriate even when state of mind is at issue.** *Id.* at 1006 (emphasis added).

See ***Van de Zilver v. Rutgers University***, 971 F.Supp. 925, 931 (D.N.J. 1997). In ***Van de Zilver***, plaintiff student's motion for summary judgment was denied. Rutgers' motion for summary judgment was granted. The Court upheld the University's decision not to admit a student to its medical school based upon faculty evaluation of the student's academic record and other "non-cognitive factors not easily assessed from transcripts." The Judge would not override the professional judgment of the faculty. 971 F.Supp. at 928.

In *Van de Zilver, supra*, 971 F.Supp. at 934, the Court relied upon the United States Supreme Court admonitions that:

> If a federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions – decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision making. *Ewing*, 474 U.S. at 226, 106 S.Ct. at 514 (internal citations omitted). 971 F.Supp. at 934.

The Court found the standard of review to be "very narrow." ***Id.*** Again referring to plaintiff's burden, the Court stated:

> Plaintiff has failed to come forth with any evidence whatsoever that the decision to terminate him from the Joint Program was the product of bad faith or ill will. ***Id.***

See also: ***Carley v. Arizona Board of Regents***, 153 Ariz. 461, 737 P.2d 1099, 1102-03 (Ariz.App. 1987) (***Ewing*** adopted – discretion to determine, on academic grounds, who may be admitted to study, has been described as one of the four essential freedoms of a university); ***Gupta v. New Britain General Hospital***, 239 Conn. 574, 594-96, 687 A.2d 111 (1996) (judicial circumspection is particularly warranted in the context of academic decisions concerning medical competency); ***Johnson v. Cuyahoga City Community College***, 29 Ohio Misc.2d 33, 34, 489 N.E.2d 1088 (1985) (in the grading procedure or system, educators are uniquely qualified in their field and they depend

upon a certain degree of autonomy for the smooth operation of educational institutions – like the appraisal of artwork, or the appreciation of music, grading determinations are essentially subjective and evaluative, lacking firm rules or guidelines or purely empirical data); ***Morin v. School of Nursing***, 34 Ohio App.3d 19, 22, 516 N.E.2d 1257 (1986) (university faculties must have the widest range of discretion in making judgments concerning academic performance of their students and their entitlement to promotion or graduation); ***Tobias v. Univ. of Texas***, 824 S.W.2d 201, 208-211 (Tex.App.-Fort Worth 1991) (decision of individual professor as to proper grade for a student in a particular course requires an expert evaluation of cumulative information and is not really adapted to the tools of judicial decision making – narrow avenue for judicial review, court must review the record for some evidence that professional judgment was exercised and if any evidence exists that there was some rational academic basis for the complained of decision, the substantive due process inquiry ceases).

Summary judgment for Pima was not only proper but mandated by Petitioner's complete inability to marshal facts in his support and upon the foregoing legal principles of academic decision making.

B. Petitioner Has Not Presented Any Competent Evidence. All Of His Allegations Are Speculative And Conclusory – Not Factual, And Do Not Create A Fact Issue.

Petitioner alleges his failure by Ms. McCormick was based upon bias and prejudice against him including his

political and religious beliefs, personality and looks. He admits he has no facts to support his beliefs and is merely speculating. **Doc. 83 at 8, 9, 10, 12, 13, 14-15.**

"[T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." ***Anderson v. Liberty Lobby, Inc.***, 106 S. Ct. 2505, 2511 (1986). A party opposing summary judgment is entitled to the benefit of only **reasonable** inferences that may be drawn from the evidence put forth. ***Barnes v. Arden Mayfair, Inc.***, 759 F.2d 676, 680 (9th Cir. 1985).

Petitioner also alleges Pima maliciously discriminated against him. Yet, he admits in deposition that his allegations of discrimination and malice are founded on nothing more than his speculation because he knows his PR was "superb". **Doc. 83 at 6, 8, 14, 15.**

These are not "facts" or "competent evidence" creating an issue for a fact finder.

Finally, Petitioner argues that Pima's acts, particularly those of McCormick, were a substantial departure from accepted academic norms. He does not provide testimony or evidence of what the normal and accepted academic standards are from which Pima departed. No health care witness reviewed the PRs. **Doc. 83 at 8.**

Summary judgment proceedings are not a substitute for jury trials. However, a motion for summary judgment should be granted if the opposition to the motion has so little probative value, given the quantum of evidence

required, that reasonable people could not agree with the conclusion advanced by the proponent of the opposition to the motion.

See also factually similar medical and student cases upholding defense summary judgments: ***Gupta v. New Britain General Hospital***, 239 Conn. 574, 687 A.2d 111 (1996) (physician discharged – merely alluding to facts does not establish them); ***Tobias v. Univ. of Texas***, 824 S.W.2d 201 (Tex.App.-Fort Worth 1991) (nursing student failed for not submitting nursing process after being warned); ***Morin v. School of Nursing***, 34 Ohio App.3d 19, 516 N.E.2d 1257 (1986) (nursing student dismissed after being advised of deficiencies – not arbitrary and capricious); ***Johnson v. Cuyahoga City Community College***, 29 Ohio Misc.2d 33, 489 N.E.2d 1088 (1985) (nursing student has burden of showing exam arbitrarily and capriciously graded); ***Soong v. University of Hawaii at Hilo***, 72 Haw. 586, 825 P.2d 1060 (Haw. 1992) (nursing student allegedly forced to withdraw from program for non-academic reasons – § 1983 claim dismissed, no constitutionally protected right to continued enrollment).

C. Petitioner's ADA Claim is Spurious.

Petitioner alleges an ADA violation. He claims Defendants Gilbert, McCormick and Brajevich failed to comply with the ADA when Petitioner notified them he had a difficulty communicating, "i.e., plaintiff dislikes chatting." **Doc. 83, 14**. His disability was that he did not like talking with people. ***Id.*** Petitioner did not request an accommodation for his dislike of chatting. ***Id.*** Although he is not mentally ill, they thought he was and they

should have accommodated him for mental illness. *Id.* They should have been more tolerant and patient. *Id.* Petitioner did not request an accommodation as a result of mental illness. *Id.*

In ***Rossomando v. Board of Regents of the University of Nebraska***, 2 F.Supp.2d 1223 (D.Neb. 1998), Plaintiff alleged that defendants knew of her "depth perception condition" and made no reasonable accommodation for the disability thereby violating her rights under the ADA. The Court found:

> [A]n academic institution can be expected to respond only to what is known (or is chargeable with knowing). *Wynne v. Tufts University School of Medicine*, 976 F.2d 791, 795 (1st Cir. 1992) (granting summary judgment for the medical school on a medical student's Rehabilitation Act claim that school failed to reasonably accommodate his vision problems when the student made no claim of vision problems until after the school dismissed him), *cert. denied*, 507 U.S. 1030, 113 S.Ct. 1845, 123 L.Ed.2d 470 (1993). Thus, "to be liable under the Rehabilitation Act, [it] must know or be reasonably expected to know of [a student's handicap]." *Id.* (quoting *Nathanson v. Medical College of Pa.*, 926 F.2d 1368, 1381 (3rd Cir. 1991)). Therefore, a "relevant aspect of this inquiry is whether the student ever put the medical school on notice of his handicap by making 'a sufficiently direct and specific request for special accommodations.' " *Id.* (quoting *Nathanson*). The same is true under the ADA. *See, e.g., Tips v. Regents of Texas Tech University*, 921 F.Supp. 1515, 1518 (N.D. Tex. 1996) (holding that the plaintiff failed to establish a prima facie case because the post-graduate

> student did not make her learning disability known to the school) (quoting legislative history and regulations for ADA). *Id.* at 1230 (footnote omitted).

Finding plaintiff had not informed the school of any alleged disability the Court held:

> In summary, on this record, no reasonable jury could return a verdict for the plaintiff regarding her disability claim. In particular, we cannot fault the defendants for failing to accommodate the plaintiff's visual/tactile problems when she did not tell the defendants about those problems or request an accommodation for them. *Id.*

Petitioner's ADA claim is spurious. Summary judgment was mandated.

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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